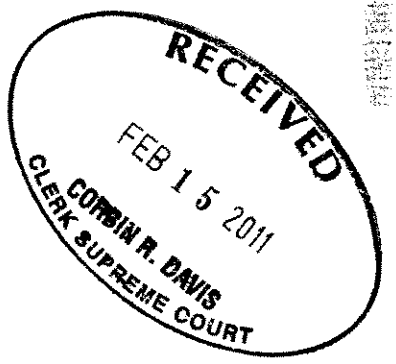
LAW OFFICES
MOGILL, POSNER & COHEN
27 E. FLINT STREET, 2ND FLOOR
LAKE ORION, MICHIGAN 48362

KENNETH M. MOGILL
M. JON POSNER
MARJORY B. COHEN

(248) 814-9470
FAX (248) 814-8231

MARK E. WEISS
(1944-2003)



February 14, 2011

Corbin R. Davis, Clerk
Michigan Supreme Court
P O Box 30052
Lansing MI 48909

re: proposed amendments to chapter 9 of Michigan Court Rules

Dear Mr. Davis:

Among the amendments to MCR 9.101 *et seq.* proposed by the State Bar, the proposed amendment to MCR 9.115(F)(4) is particularly appropriate to promoting justice and fairness in the attorney discipline system. The Attorney Grievance Commission's objections to this proposed amendment do not withstand scrutiny.

The Michigan attorney discipline system is alone among the 50 states and the District of Columbia in failing to provide meaningful disclosure of relevant information in the attorney discipline process. Michigan's refusal to allow disclosure of even basic relevant information is also inconsistent with the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement, Rule 15. To the best of my knowledge (and this is an issue I have studied for many years) over 30 jurisdictions allow broad, civil-type discovery processes in attorney discipline cases; the remainder require broad disclosure comparable to that required in criminal cases in Michigan but not civil-type discovery. No state's discovery rule or practice in attorney discipline proceedings is anywhere near as restrictive as Michigan's.

Michigan's failure to require mutual disclosure of relevant information in attorney discipline proceedings is also inconsistent with the discovery rule and practice in felony cases: MCR 6.201 requires mutual broad disclosure of relevant information in felony cases. As a result, in Michigan today, an individual accused of murder, rape, conspiracy to sell drugs or obstruction of justice is entitled to production of far more relevant information than is an attorney accused of neglecting a case or any other ethical lapse.

The restrictions of MCR 9.115(F)(4) are also inconsistent with the routine practice in discipline cases against licensed health professionals in Michigan. In such cases, the Attorney General's office regularly turns over to defense counsel all relevant case information.

Experience in both civil and criminal litigation has long since demonstrated the wisdom of

broad discovery and disclosure rules: Broad, mutual exchanges of information promote the search for the truth, further the efficiency of the litigation process and increase the likelihood of pre-trial case resolution.

Given this array of rules, policy considerations and experience favoring at least broad disclosure in the attorney discipline process, the question for opponents of the State Bar's proposed amendment is as follows: What is there about Michigan attorneys that requires treating them differently from attorneys in all other states, from other professional licensees in Michigan and from accused felons in Michigan with respect to mutual disclosure of relevant case information? The answer is plainly "nothing".

The Attorney Grievance Commission's objections to the State Bar's proposed amendment assert that amending the rule would result in "unnecessary discovery battles" and "result in the need for increased AGC staff". Since the proposed amendment would provide for disclosure comparable to that in Michigan criminal cases, the long experience of Michigan prosecutors provides an effective basis for comparison. That experience does not remotely support these objections. To the contrary, prosecutors' offices throughout Michigan routinely and promptly make witness statements, police reports, etc., available to defense counsel, increasingly doing so efficiently via electronic means, without any discovery battles or any need for any additional staff.

The AGC's objection that the proposed amendment is "poorly written" ignores the fact that the proposed language is taken almost *verbatim* from the ABA Model Rule, a rule which has shown itself to be very workable.

The AGC's objection that the proposed amendment is "not traditional to Michigan" is a *non sequitur*, as it argues against changing the rule simply because the proposed amendment would change the rule.

The AGC is further off-base in objecting on the ground that "[c]riminal prosecutors do not engage in civil discovery". As noted above, the proposed amendment would *not* be as broad as ABA Model Rule 15 and would *not* provide for civil-type discovery in Michigan attorney discipline proceedings. Rather, it would provide for mutual disclosure of existing relevant information.

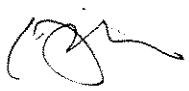
The State Bar carefully considered this and all of its other proposed amendments. The committee appointed by the Bar, of which I was a member, included prosecutors, hearing panelists, former AGC staff attorneys, academics, at least one former member of the AGC itself and representatives of the respondents' bar. The committee's discussions were thoughtful and unbiased. Its resulting proposals are well-grounded in both policy and practice.

For all of these reasons, I respectfully encourage the Court to adopt the State Bar's proposed

amendment to MCR 9.115(F)(4).

Thank you in advance for your consideration of these comments.

Sincerely,



Kenneth M. Mogill

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